

**Dr. Pepper Bottling Company of Huntington, Inc.
and Mike Donahoe and Bill Elkins. Cases 9-
CA-19723-1 and 9-CA-19723-2**

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER

On 30 December 1983 Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions, to modify the remedy,² and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dr. Pepper Bottling Company of Huntington, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Expunge from its files any reference to the unlawful layoff of Mike Donahoe and refusal to rehire Bill Elkins and notify these employees in writing that this has been done and that evidence of this unlawful layoff and refusal to rehire will not be used as a basis for future personnel action against them."

2. Substitute the attached notice for that of the administrative law judge.

¹ The judge under sec. III. par. 3, of the opinion incorrectly identified the date Elkins was asked by Hager to restock the soft drink machine. The date was 6 December 1982, which was the same date Elkins quit.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's findings of 8(a)(3) violations, we hereby modify the remedy to require that the Respondent expunge from its files any references to Mike Donahoe's unlawful layoff or its refusal to rehire Bill Elkins and notify these employees in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel action against them.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice. Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off, fail to rehire, or otherwise discriminate against any of you for supporting Teamsters Local Union, Local No. 505, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Mike Donahoe and Bill Elkins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination against them, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the unlawful layoff of Mike Donahoe and refusal to rehire Bill Elkins and notify these employees in writing that this has been done and that evidence of this unlawful layoff and refusal to rehire will not be used as a basis for future personnel action against them.

DR. PEPPER BOTTLING COMPANY OF
HUNTINGTON, INC.

DECISION

KARL H. BUSCHMANN, Administrative Law Judge. This case involves two consolidated complaints, issued on June 1 and 10, 1983, respectively. It was tried before me on September 13, 1983, at Huntington, West Virginia. It is alleged in Case 9-CA-19723-1 that the Respondent, Dr. Pepper Bottling Company of Huntington, Inc. laid off Mike Donahoe for his involvement in a union organizing campaign, in violation of Section 8(a)(1) and (3) of

the National Labor Relations Act. Respondent denied the allegations and maintains that Donahoe was laid off for good cause. Similarly, Case 9-CA-19723-2 alleges that Bill Elkins' union activities were the reason that Respondent failed to rehire him after he quit his job, and that Respondent has thereby violated Section 8(a)(1) and (3) of the Act. Respondent contends that it was under no obligation to rehire Elkins, and further asserts that his complaint is barred by the 6-month statute of limitations of Section 10(b) of the Act.

Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by Respondent and the General Counsel, I make the following

FINDINGS OF FACT

The Respondent, Dr. Pepper Bottling Company, is engaged in the production, bottling, and distribution of soft drink products at its facility in Huntington, West Virginia. It is the holder of a franchise to produce and distribute Dr. Pepper products in a 13-county area in West Virginia, Ohio, and Kentucky. Respondent admits the jurisdictional allegations of the complaint including its status as an employer within the meaning of Section 2(2), (6), and (7) of the Act.

On October 12, 1982, a representation petition was filed in Case 9-RC-14160 by Teamsters Local Union No. 505, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, concerning the organization of workers at Dr. Pepper. A hearing in the representation case was held on November 4 and 5, 1982. The Regional Director for Region 9 issued a Decision for Direction of Election on December 1, 1982. The election was held on January 5, 1983, in which the Union was defeated. The union activity was initiated through the efforts of Bill Elkins and Mike Donahoe, both employed by Respondent who had contacted the Union in September 1982.

Mike Donahoe

Until his layoff or discharge on December 10, 1982, Mike Donahoe worked at Dr. Pepper as a driver-salesman. His job involved taking a soft drink truck on a specific route, stopping at various customers' places of business and supplying them with Dr. Pepper products. He stocked the shelves himself to ensure that they rotated regularly and that the shelf space was kept neat and attractive to customers.

According to his uncontroverted testimony, the possibility of having a union at Dr. Pepper was first discussed by employees in late September or beginning of October 1982. Donahoe had worked for a time at the Coca-Cola Bottling Company in Huntington and belonged to Teamsters Local 505. He was acquainted with Bob Hall, the union representative, and offered to obtain union authorization cards from him. Donahoe went to the union headquarters with Bill Elkins, signed a card and gave it to Elkins, who kept the rest of the cards. Thereafter, he spoke with several employees regarding the Union, and expressed his support of the campaign. He attended a

union meeting, and on one occasion wore a union badge at work saying, "Vote Teamsters."

Respondent's witnesses testified that they never saw Donahoe wearing this badge. Carlton Hager, Dr. Pepper's sales manager, testified that he was unaware of the union activity until the filing of the election petition in late October 1982. After the petition had been filed, Hager approached Donahoe while he was stocking the drink racks at a supermarket. Hager demanded to know "what the hell was going on." Donahoe told him that many of the drivers and other employees were dissatisfied with their benefits and wanted to know why Dr. Pepper could not do the same for its workers as other companies did for theirs. According to Donahoe, Hager then stated that, "I know a lot on everybody up there, enough probably to can everybody," and he said to Donahoe, "I just hope to hell that you're not involved in something like this."

On December 10, 1982, Donahoe was laid off by Dr. Pepper. Both sides agreed that the reason given by Hager to Donahoe for his layoff was the Company's economic need to cut back routes. Respondent relied on its records of sales by the Company's driver-salesmen indicating that, for the years 1980 and 1981, Donahoe had the greatest percentage drop of any of the driver-salesmen, 26 percent (R. Exh. 3). Donahoe's lower sales, according to Hager, were the primary reason for his dismissal. Donahoe, however, attributed the decrease in his sales to the closing of major accounts on his routes after he had initially acquired them, as well as the temporary elimination of his route, which did not pick up again after he reacquired it. He felt he lost business because competitors could sell at a lower rate than he was able to do.

Hager also cited Donahoe's unreliability as a reason for the layoff. For example, some customers maintained that they could never be sure when Donahoe would show up. In addition, Respondent produced two affidavits from the owners of a store on Donahoe's route, Borders' Summitt Market in Ashland, Kentucky. Donahoe, according to them, had come to the store on October 11, 1982, and attempted to deliver empty boxes but charged the store for them. Hager stated that Donahoe's apparent dishonesty was an additional factor in his dismissal. While Hager testified that he had investigated the incident at Borders' Market and had confronted Donahoe about it, this incident seemed to have been of little consequence in the consideration of Donahoe's discharge. There is testimony that Greg Borders, the owner of the store, had been particularly upset that day because his house had been broken into the night before. This may have prompted the accusations against Donahoe. The other supervisor, Production Manager Woodrow Godley, testified that general economic conditions were cited by Hager in telling Donahoe of his layoff, but Godley specifically stated he could not testify as to whether the Borders' Market incident was part of the consideration. An official "Record of Counseling" written up by Hager (R. Exh. 7) simply stated that the decision to lay off Donahoe "was based on [his] past record."

The only warning Donahoe has received about his work was a letter dated November 19, 1982 (R. Exh. 8), telling him to stop "holding out" money when he turned in his collections. Company policy allowed driver-salesmen to keep up to \$20 per week from the funds they collected on their routes which would then be deducted from their paychecks. Donahoe, who had kept more than the \$20, was informed that failure to conform to company guidelines could result in his termination. Dennis Frazier, the president of Dr. Pepper at the time and the author of the letter, who had sent a similar letter to Curtis Burdine, another driver, indicated in his testimony that holding out money was a common practice at the plant, but that he simply wanted it stopped. In short, Donahoe's declining sales appeared to be Respondent's official reason for his layoff and the other reasons for his dismissal—his problem with customers, the incident at Borders' Market, the holding out of money—appear to have been offered by Respondent in hindsight. And Donahoe's total sales, even after the drop, do not appear to be low when compared to the total sales of other salesmen.

Considering all the circumstances, the abruptness of the layoff during the union activity—shortly before the election and several days after the order for an election—is an indication that antiunion motivation was the real reason. *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829. This is also supported by the testimony of one witness, Dewey Harmon. As part owner of the Chesapeake Tire Stop in Huntington which had an account with Dr. Pepper, he often dealt with Carlton Hager.

Harmon testified that he and Hager were standing in the front of the store as Donahoe drove by. Harmon waved at him and pointed him out to Hager. Hager then said, "Yeah, I had to let Mike go, him and somebody else, we felt, was trying to get a union in at Dr. Pepper." Harmon stated that he had not known of Donahoe's dismissal before then.

Hager could not recall ever having been at the Chesapeake Tire Stop when Donahoe drove by, and generally denied having made the statement. I credit Harmon's forthright testimony. He had nothing to gain from testifying in Donahoe's favor. I have therefore no difficulty in finding that Dr. Pepper Bottling Co. violated Section 8(a)(1) and (3) of the Act by the layoff of Mike Donahoe.

Bill Elkins

Bill Elkins had been employed at Dr. Pepper since 1978 in a variety of capacities, most recently as the Company's vending machine maintenance employee. He testified that he and Mike Donahoe went to the Teamsters local office in October 1982 to obtain union authorization cards. Elkins took virtually all the cards himself and distributed them personally or gave them to another employee to distribute. He attended the initial union meeting held at the Teamsters office. Elkins testified at the representation hearing held on November 3 and 4, 1982.

During the course of his association with Dr. Pepper, Elkins had quit work there on several occasions, only to be hired back when he asked. The longest such hiatus

occurred in 1980 when he went to another job in Kentucky, but returned after about a month and was reinstated.

On December 7, 1982, Elkins was asked by Hager to restock a soft drink machine. This was a function he had apparently performed from time to time. Hager instructed him to remove the money from the machine's cash box. When Elkins got there he found the money removed and a note from Frazier instructing him which flavors to restock. Rightly or wrongly, Elkins perceived this as evidence that management did not trust him. He returned to the plant, initially complained, and then quit his job.

This dispute concerns the legality of management's refusal to rehire Elkins when, a few days later and having presumably cooled off, he wanted his job back. He contends he was unlawfully denied reinstatement because of his union activities. Respondent maintains that it had no duty to reinstate him, that this action was barred by Section 10(b) of the Act and that he was a supervisor.

Supervisory status. Respondent contended then, as it does now, that he was a supervisor and as such should have been excluded from the bargaining unit. Counsel for Respondent expressed his intent at the hearing to challenge the Regional Director's finding in the representation case that Elkins was not a supervisor. However, the only questioning in this regard conducted by Respondent's representative concerned whether Elkins had gone to investigate the Donahoe-Borders' Market incident in a supervisory capacity. Elkins denied it, as well as General Counsel's questions whether Elkins had ever fired, suspended, warned, or disciplined an employee, or assigned work. Since the record contains no evidence which indicates that Elkins possessed any indicia of supervisory authority, there is no reason to take issue with the Regional Director's decision and accordingly I find that he was not a supervisor.

Timely filing of the charge. The alleged unfair labor practice in this complaint is Hager's refusal to reinstate Elkins following a request to return. With respect to Section 10(b) of the Act, Hager testified that the request was made by Mary Elkins on December 7, 1982. Mrs. Elkins and her husband both stated that she called Hager on December 12 requesting that her husband be recalled. Although there was some dispute as to whether Mary Elkins actually made the call, there is little doubt that she did place the call and spoke with Hager. Her testimony was believable and Hager admits having spoken with her. The charge was filed on June 10. If Respondent's date is accepted, the 6-month period would have expired and Elkins' claim would be barred, but if Elkins' date of December 12 is adopted, the charge was timely.

Respondent attempted to support its contention of December 7 as the date of Elkins' call with a business card of Hager containing the notation, "Mary Elkins called about Elkins job back December 7, 1982, 7:30." (R. Exh. 1.) Hager testified that he was at home watching television when she called on that day.

The General Counsel's assertion that the actual date was December 12 is based on the testimony of Elkins and his wife. Both testified that it was December 12 be-

cause they remembered watching the Cincinnati Bengals football game on television that day with Carlton Hager Jr., a friend of Elkins. Indeed, Elkins testified that young Hager had encouraged him to call his father about getting his job back.

Both Hager Sr. and Mary Elkins executed affidavits (not part of the record) which seemed to be slightly at odds with their testimony. For example, Hager's affidavit makes no mention of the business card, even though he stated that he had placed it in Elkins' personnel file, and Mary Elkins' affidavit was not definite about December 12, but stated it was either December 11 or 12. She remembered later that it had to be a Sunday since the Bengals usually play on Sundays.

On balance, I find Elkins' testimony more credible than Hager's. I found his testimony already at odds with that given by Harmon relating to Donahoe's layoff. The belated discovery of the business card in Elkins' file does not add to Hager's credibility. Had Hager made the notation at the time and placed it in Elkins' file, he would have mentioned it in his affidavit after reviewing Elkins' file. I find, therefore, that Elkins' claim is not barred by the 6-month period of Section 10(b).

The refusal to rehire. The testimony of Mary Elkins and Dewey Harmon, both of whom I credit, support a finding that Respondent refused to rehire Elkins on the basis of his union activity.

Mary Elkins testified that, when she called Hager, he told her that he could not hire Elkins because he was involved in the Union. When she said her husband was not the only one involved, Hager responded that "he was aware of that and that as of Friday, Mike Donahoe was no longer employed by them." Hager went on to say that Elkins and Donahoe were the ones passing out the union cards.

That Elkins' union activity was known by Respondent is also supported by Harmon's testimony. He testified that Hager had said, "We had to let Mike go because we felt him and *someone else* was involved in trying to bring a union into Dr. Pepper." [Emphasis added.] When coupled with Hager's statements to Mary Elkins, Harmon made it clear that Elkins' activities were known to management. Mary Elkins also testified that Hager clearly said her husband could not return to work because of his union involvement.

Hager, however, testified that he had never mentioned the Union and that he told her that Elkins had quit "one too many times . . . he didn't quit to me this time, he quit to the President of the company, and there was no way I was going into the President of the company and jeopardize myself in a situation like this."

Respondent has reemployed Elkins on a number of previous occasions. And when Donahoe talked with Hager about Elkins, Hager indicated to Donahoe that, if Elkins were given a few days to cool off, he would be brought back and everything would be worked out. Obviously, Respondent subsequently changed its position and refused to rehire him.

Certainly Dr. Pepper had no obligation to reinstate Elkins after he quit his job, especially considering that he himself did not have the proper motivation to make the request and, instead, had his wife initiate the telephone

call. But confronted with this record, the testimony of Mary Elkins seemed more credible than Hager's. Moreover, also considering Respondent's unlawful discharge of Donahoe, the conclusion is inescapable that "but for" his union involvement, Elkins would have been rehired by Dr. Pepper. Respondent therefore discriminated against Elkins "in regard to hire or tenure of employment."

CONCLUSIONS OF LAW

1. The Respondent, Dr. Pepper Bottling Company of Huntington, Inc., is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

2. The Union, Teamsters Local Union No. 505, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off employee Mike Donahoe and refusing to rehire Bill Elkins, Respondent has interfered with the rights accorded them by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act.

4. By laying off Mike Donahoe and refusing to rehire employee Bill Elkins because of their support of the Union, Respondent has discriminated against them in regard to hire and tenure of employment in violation of Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged and failed to rehire its employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Dr. Pepper Bottling Company of Huntington, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, failing to rehire, or otherwise discriminating against any employee for supporting Teamsters Local Union, Local No. 505, or any other union.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Mike Donahoe and Bill Elkins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Huntington, West Virginia, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

² If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."